Supreme Court, U.S.
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No. 04- 04 167

IN THE

Supreme Court of the United States

DAVID GIBSON, an individual and ALL UNKNOWN INDIVIDUALS who may claim any interest in the real property which is the subject of these proceedings, individually jointly and severally,

Petitioner,

v.

ORSON MERRILL and LYDIA MERRILL, Husband and Wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

VERNON K. SMITH
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney for Petitioner

188435

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Decision of the Supreme Court of Idaho, upholding its "*nunc pro tunc*" Order of Assignment of retired former District Judge D Duff McKee, as entered by the Vice Chief Justice of the Idaho Supreme Court, "retroactively" after the trial, and notwithstanding the disqualification of the retired Judge, constitutes a denial of Petitioner's constitutional Due Process and equal protection rights under the United Stated Constitution.

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OPINION BELOW

The Opinion of the Idaho Supreme Court on this issue (Appendix A) is reported at *Merrill v. Gibson*, __ Idaho __, 87 P.3d 949 (2004), Opinion No. 20, Docket No. 28542, filed and released February 27, 2004. The Idaho Supreme Court's Order, Denying Petition for Rehearing (Appendix C) is referenced in the published opinion.

JURISDICTION

The Decision of the Idaho Supreme Court was released and filed on February 27, 2004, (Appendix A). A timely petition for rehearing was denied on April 12, 2004 (Appendix C). This court has Jurisdiction of this case under 28 U.S.C. § 1257, and Supreme Court Rule 10 (b) and (c) in that the Idaho Supreme Court has engaged in State action that has violated an important due process and equal protection right of Petitioner, and done in a way, employing legal concepts, that contradicts and conflicts with decisions of both Idaho and other state courts of last resort or Federal courts. Under Idaho Constitution, Article I, § 3, the State of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land and this Court has jurisdiction over those rights and privileges guaranteed therein.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Constitution of the United States, Fourteenth Amendment:

> § 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Idaho Constitution, Article V, § 11 and § 12

3. Idaho Constitution, Article I, § 3

4. *Idaho Code*, § 1-2001 through § 1-2005

5. Rule 40(d)(1), Idaho Rules of Civil Procedure (I.R.C.P.)

6. Rule 40(d)(1)(I)(iii), Idaho Rules of Civil Procedure (I.R.C.P.)

STATEMENT OF THE CASE AND FACTS

This case began in the Idaho Courts concerning the right to ownership of a twenty-acre parcel of land located South of the city of Boise, located in the State of Idaho. The Judgment was entered by retired District Judge D. Duff McKee, over Petitioner's timely Motion to Disqualify the retired Judge, as he had not been assigned or appointed by

either the provisions of Idaho Constitution, Article V § 11 or 12, or under the requirements of Idaho Code, § 1-2001, § 1-2005, § 1-2005(2), or § 1-2005(3), as his "order of assignment" came "*nunc pro tunc*", entered *un*-certified, and almost three (3) weeks later by the *Vice* Chief Justice of the Idaho Supreme Court.

This Writ concerns the complete lack of jurisdiction and authority of the retired Judge when he heard and decided the case, and the decision of the Idaho Supreme Court to perpetuate a Constitutional violation of Petitioner's rights of due process and equal protection, should not be condoned. This Writ raises the constitutional concerns that result when the highest State court allows a retired Judge to retroactively become vested with authority, in violation of provisions of its own State statutes and Constitution, and in the clear absence of any existing judicial appointment or assignment, and solely by the use of a "retroactively" created order, entered "*nunc pro tunc*". The Idaho Supreme Court Clerk Records at the relevant times confirmed retired Judge McKee was never specifically assigned to the District Court, and no certified order of the Supreme Court of Idaho *ever existed before*, during, or after the trial, until this retroactive "order" was entered almost 3 weeks later, on April 16, 2002, which therein declared an Order of Assignment, "*nunc pro tunc*" to January 1, 2002 by Order of the Supreme Court under signature of Vice-Chief Justice, of the Idaho Supreme Court, Gerald S. Schroeder (Appendix B).

This question of authority and the meaning and application of a "*nunc pro tunc*" order, as entered and processed "retrospectively" by the Idaho Supreme Court has several due process concerns because of Petitioner's denial of a valid judge to hear his case, and the denial of equal

protection in the use of the Idaho statutory enactment § 1-2001 *et seq*. It is undisputed this retired judge did not first obtain a certified order of assignment from the Supreme Court, nor was there any observance of the Idaho Constitutional mandate of Article V, §§ 11 & 12 or compliance with the statutory criteria under *Idaho Code*, § 1-2005 *et seq*.

Under the Idaho Constitution, Article V, § 11, "a judge shall be chosen by the qualified electors" and "whose term of office shall be (4) four years". D. Duff McKee was not an elected judge at the time, as he retired from the Fourth District on July 31, 2000. Since he was not serving as an elected judge, he instead could come within a special class of treatment covered by Article V, Section 12, Constitution of Idaho. It therein provides

> any retired district judge may hold a district court in any county at the request of the judge of the district court thereof, *and* upon the request of the governor or Chief Justice, *and* when any such request is made *and* approved by the Chief Justice, it shall be his duty to do so; but a cause in the district court may be tried by a judge pro tempore, who must be a member of the bar, *agreed upon in writing by the parties* litigant, or their attorneys of record, and sworn to try the cause. (Emphasis added).

This retired judge was not requested by the Governor, Chief Justice or any district judge; nor appointed by the Chief Justice and did not sit with consent, but rather sat, despite the written disqualification timely filed by the Petitioner,

upon his statement there was an order of assignment from the Supreme Court. The retired judge stated:

> There's an application to recuse under 40(d)(1). . . . There's an order from the Supreme Court that makes the rule not applicable to designation of Senior Judges, which is what you all are saddled with today.

The records with the Clerk of the Idaho Supreme Court confirm he was not appointed by *any* order of the Supreme Court at the time he made that statement on March 25, 2002 (*See* Appendix A).

Notwithstanding the provisions of the Idaho Constitution, the Idaho Legislature created a statute that broadened the concept announced in Article V, § 12, Constitution of Idaho, and provides a different manner, to allow a temporary assignment to a State Court to occur whenever, upon application by a lower court, the Supreme Court determines the assignment is reasonably necessary (§ 1-2005(2), *Idaho Code*), and a *certified* order of assignment is entered (§ 1-2005(3), *Idaho Code*).

Assuming this Idaho statute were constitutional, the "assignment" defined in § 1-2005, *Idaho Code*, must be made by an "order" which shall "designate" the court or duties, the duration of the assignment, and the order be certified. The statute further requires "promptly" *after* assignment, the Supreme Court cause a "certified copy of the order" sent to the Senior Judge and another "certified copy" sent to the court to which the Judge is assigned. The assignment can exist *only* by virtue of the *certified* order. Critical to this statute is the *existence* of the certified order, before any

assignment could be valid, even under the terms of this statute.

There is no dispute no assignment existed regarding retired Judge D. Duff McKee when he sat on the bench on March 25th, 26th, and 27th, 2002, or when he entered the Findings of Fact, Conclusions of Law, Judgment and Decree Quieting Title on April 3, 2002. The only "assignment by Supreme Court Order" of Retired Judge McKee came into existence on April 16, 2002, because of Petitioner's inquiring how it was and in what manner D. Duff McKee had any right or authority to assume the role as District Judge on Petitioner's case when no order existed, and was properly disqualified under the Idaho Rules of Procedure, Rule 40(d)(1), allowing automatic recusal without cause, as he was not exempt under Rule 40(d)(1)(I)(iii). The Order of April 16, 2002 confirms, by its very format and content, no other order existed, as the order attempted to "retroactively" appoint the Judge back to January 1, 2002, by entry "*nunc pro tunc*", as no assignment by order of the Supreme Court under that statute existed when D. Duff McKee chose to enter the courtroom, sit on the bench, deny Petitioner's Motion to Disqualify him, and proceed to act as a judge, when he knew he had no certified order, had no such authority, had no jurisdiction and no District Court held any Order appointing or assigning him. This subsequently entered Order of Assignment was signed by the Vice Chief Justice, Honorable Gerald S. Schroeder, "*nunc pro tunc*" in an attempt to make retroactive an order of assignment that never before existed.

Prior to trial, Petitioner inquired of the District Court if any Supreme Court assignment had been entered of record, as two (2) business days before trial, the indication was

expressed a retired judge may hear the case, and D. Duff McKee's name was mentioned. The Court confirmed it had no order found to exist. Consequently, there was no exempt status to prohibit disqualification under Rule 40(d)(1), I.R.C.P., as no specific assignment by the Supreme Court of Idaho existed under Rule 40(d)(1)(I)(iii), and no procedural impediment would preempt recusal of D. Duff McKee as allowed under Rule 40(d)(1), I.R.C.P.

The issue of whether the Idaho Supreme Court's decision constituted prohibited "state action" under the Fourteenth Amendment violating Petitioner's due process and equal protection rights, was raised by the Petition for Rehearing and addressed in the Memorandum in support thereof. The Petition for Rehearing was denied by the Court, without any comment.

REASONS FOR GRANTING THE PETITION

The Idaho Supreme Court cannot undertake the use of a "*nunc pro tunc*" format as a "house cleaning" attempt to resolve a procedural dilemma, as it constitutes a due process violation of Petitioner's rights by perpetuating a judicial capacity that had Never been created, as required by statute, and a non-judge who attempts to assume a judicial role cannot be retroactively cloaked with authority by post enactments and "*nunc pro tunc*" proceedings, as a matter of law.

According to case precedence, the only valid concept endorsed by the courts for the use and allowed entry of any "*nunc pro tunc*" order is to confirm what had actually been done before, and a very fundamental analysis has been addressed within our American jurisprudence in a number of long established, well tested cases across the nation.

The only allowed purpose for using this concept, as defined in law, is to affect "an entry made now for something which was actually previously done, to have effect as of the former date". It is to recite now what was actually done then, and being pursued simply to correct the *existing record*, not make a record *that did not exist*.

This concept was found in the case of *Perkins v. Hayward*, 132 Indiana 95, 10131 N.E. 670, 672 (1892). It continues to be cited as among the cherished definitions, cited in *Blevins v. Commonwealth of Virginia*, Court of Appeals (1996) and *Cotton v. State of Indiana*, Supreme Court of Indiana (1995). In *Cotton v. State of Indiana*, the Court stated:

> a *nunc pro tunc* entry is defined in law as "an entry made now of something which was actually previously done, to have effect as of the former date." (citing) *Perkins v. Hayward*, 132 Ind. 95, 101, 31 N.E. 670. 672 (1892) . . . Its purpose is "to supply an omission in the record of action really had, but omitted through inadvertence or mistake (citing) Perkins, *supra*.
>
> The trial court's *record*, however, must show that the unrecorded act or event *actually occurred*. Thus, this court has required that a written memorial must form the basis for establishing the error or omission to be corrected by the *nunc pro tunc* order. (citing) *Blum's Lumber & Crating, Inc. v James*, 259 Ind. 220, 223, 285 N.E.2d 822, 824-25 (1972).

> In order to provide a sufficient basis for the *nunc pro tunc* entry, the supporting written memorial (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneously with or preceding the date of the action described.

In *Blevins v. Commonwealth of Virginia*, *supra*, the court stated:

> This appeal is controlled by *Heflin v. Commonwealth*, 211 Va. 407, 177 S.E.2d 644 (1970), in which the Supreme Court of Virginia held . . . trial courts may enter orders *nunc pro tunc* only to correct defects or omissions in the record so as to make the record show what actually took place on a prior occasion. *See also Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996).

Our Idaho Court has also addressed this issue years before in *Merrick v. Pearce*, 97 Idaho 250, 542 P.2d 1169 (1975) and *Ross v. Ross*, 103 Idaho 406, 648 P.2d 1119 (1982).

In *Ross*, *supra*, the majority noted, in footnote 1, the court did not approve the use of "*nunc pro tunc*" concept in the context it had been used. Idaho's former Chief Justice Bakes, announcing the fundamentals and disapproval of its use, stated the entire concept:

> An entry of judgment *nunc pro tunc* represents "the power of the court to amend *records* of its

judgments by correcting mistakes or supplying omissions therein, and to apply such amendments retroactively . . . ." 46 Am.Jur.2d, Judgments § 186 (1969) (emphasis added). However, "[t]he failure of a court to act, or its incorrect action, can never authorize a *nunc pro tunc* entry. If a court does not render judgment, or renders one which is imperfect or improper, it has no power to remedy any of these errors or omissions by treating them as clerical misprisions. Omitted judicial actions cannot be supplied, even though it would have been proper in the first instance, . . ." 1 Freeman on Judgments, § 131 (5th ed. 1925); *see* Annot. 19 A.L.R.3d 648 (1968). Consequently, since the partial summary judgment was lacking Rule 54(b) certification, that omission cannot later be supplied by an order *nunc pro tunc* changing the nature of the partial summary judgment. As was stated in *Black v. Industrial Comm'n of Arizona,* 83 Ariz. 121, 317 P.2d 553, 555 (1957), "[T]he court cannot do more than to make the record correspond with the actual facts."

We have recently affirmed the power of our courts to enter an order *nunc pro tunc* within the context of a motion made pursuant to I.R.C.P. 60(a), which outlines the procedure for correcting "clerical mistakes" in the record. *Merrick v. Pearce,* 97 Idaho 250, 542 P.2d 1169 (1975). In *Merrick,* the court entered an amended judgment *nunc pro tunc* to correct a clerical mistake in the amount of the original judgment.

In Petitioner's case, the order "*nunc pro tunc*" entered April 16, 2002, purported to create a judicial capacity that did not exist on March 25th, 26th, 27th and April 3rd, 2002, and attempts to validate what was pursued by a non-appointed retired judge.

The concern exists with respect to the Court's use of "*nunc pro tunc*" and "retroactive" concepts applied in contradiction to each other and contrary to case authority. This misuse, and effort to resolve a procedural dilemma, has served only to create a 14th Amendment due process and equal protection violation of Petitioner's rights. No authority for this contradictory holding has been cited in the Opinion of the Idaho Supreme Court. They avoided it. Petitioner cited the only express definition, meaning, purpose, and only basis for the application of a "*nunc pro tunc*" order. As stated even in *Ross*, *supra*, the failure of a court to act, or its incorrect action, can *never* authorize a *nunc pro tunc* entry of an order (*See Ross*, *supra*, p. 420, L 10). The current decision of the Court appears to contradict its own prior holding. Our Idaho Court has cited no authority to allow one to judicially engage in 'retroactivity" to make judicial capacity to exist when it did not exist before, in an attempt to resolve a dilemma or create a desired result, not only resolving a clear lack of authority, but also designed to affirm a decision and disenfranchise a valid disqualification of a non-assigned retired judge, all being done at the sacrifice of Petitioner's constitutional rights.

The Idaho Supreme Court had stated that: "Gibson's claim that the Idaho Supreme Court's *nunc pro tunc* order is invalid, is frivolous and without foundation". We submit that presents an affront and clear abridgment of Petitioner's due process and equal protection rights.

The Idaho Supreme Court declared in its conclusion "the *nunc pro tunc* order *retroactively* and *properly* assigned Judge McKee to this case in accordance with *Idaho Code*, § 1-2005" (*See* Opinion, p. 8, L 11), is a concept of novel use. The Court's use of the phrase "retroactively" would confirm, it does acknowledge there had never been a prior Court appointment of Retired Judge McKee. Consequently, it is true the Idaho Court had failed to act *originally*, which by law is a prerequisite for the application of any *nunc pro tunc* concept. Such failure of a court to act originally can never authorize a *nunc pro tunc* entry because of that failure to act, and a due process violation has resulted. The introduction of this "retroactive" concept, on top of a "*nunc pro tunc*" entry, serves only to beg the question, and confirm such authority never before existed at the time judicial authority was assumed, contrary to any established law.

The Idaho Court's "retroactive" assignment can be seen only as a way designed to trump what was a lawful disqualification of a non-assigned retired judge, another deliberate denial of due process-equal protection right. Our Idaho Court is attempting to undo a disqualification that was lawfully used, pursued and lawfully entitled to full enforcement under the Idaho Civil Rules of Procedure, viewed by Petitioner as another due process and equal protection denial, done to serve an agenda to resolve a procedural dilemma.

There is no case law or known legal principal that allows retroactive destruction of a lawful consequence, and the concept of retroactivity used to defeat a lawful disqualification, or non-existent judicial authorization is viewed as both novel and infringing on constitutional rights and privileges.

Our Idaho Supreme Court has used a principle of retroactivity to assign a judge under § 1-2005, *Idaho Code*, in an effort to vest authority *nunc pro tunc*, when it never before existed, attempting to create validity for a judicial role that had been assumed without a required certified order, directly violating a due process right and infringing upon equal protection

If there were found to be *any* authority to retroactively assign a retired judge, to validate his past acts while lacking authority, and should it exist separate and apart from the attempted use of this *nunc pro tunc* concept, it was not cited within the decision of our Idaho Supreme Court A Court's authority cannot be mandated retroactively or fabricated by "*nunc pro tunc*" principles, as the concept has been addressed in former Idaho cases and other state's analysis.

CONCLUSION

To say the *nunc pro tunc* order "retroactively and properly" assigned a retired judge serves only to enunciate a legal impossibility, trying to reach a desired outcome to avoid a disqualification and validate non-existent authority. If this decision remains, it will result in a difficult analysis and application of several contradictory doctrines, and disregard the exclusive rules defining and implementing the Idaho Plan B retirement statute affecting judges retiring *after* July 1, 2000, and by doing so the Idaho Supreme Court has retroactively assigned a judge to make him retroactively exempt from disqualification, when the very exemption can exist only in the context of a preexisting order of a valid assignment. A retroactive authorization cannot undo the effects of a lawful disqualification undertaken at the time there has been no existing assignment, and cannot create

judicial authority that did not exist without violating constitutional rights, and their desire to clean up or otherwise chose to conceal, whether or not it be a noble objective, serves only to deny due process and equal protection by improper state action.

Therefore, Petitioner, respectfully prays this Court grant this Petition for Writ of Certiorari, and thereafter reverse the decision of the Idaho Supreme Court, and hold judicial authority placed in a retired judge created by a "*nunc pro tunc*" order, under a retroactive assignment or appointment after the fact, attempting to validate conduct undertaken without judicial authority, and to disenfranchise a valid disqualification, constitutes a due process and equal protection violation under the 14th Amendment of the United States Constitution, by improper state action, and results in a denial of vested rights, privileges and property protected under the United States Constitution.

Respectfully submitted,

VERNON K. SMITH
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO FILED FEBRUARY 27, 2004

IN THE SUPREME COURT OF IDAHO
Docket No. 28542

2004 Opinion No. 20

Boise, December 2003 Term

Filed: February 27, 2004

Frederick C. Lyon, Clerk

ORSON MERRILL and LYDIA MERRILL, husband and wife,

Plaintiffs-Counterdefendants-Respondents-Cross Appellants,

v.

DAVID GIBSON, an individual, and ALL UNKNOWN INDIVIDUALS who may claim any interest in the real property which is the subject of these proceedings, individually, jointly and severally,

Defendants-Counterclaimants-Appellants-Cross Respondents.

Appendix A

Appeal from the Trial court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

The decision of the trial court quieting title in plaintiffs is *affirmed.*

Vernon K. Smith, Jr., Boise, argued for appellants.

Thomas G. Maile, IV, Eagle, argued for respondents.

TROUT, Chief Justice.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, David Gibson (Gibson) looked to relocate his tree and shrub nursery and negotiated to buy twenty acres south of Boise, Idaho (Twenty Acres). Gibson took possession of the Twenty Acres in June 1991, but did not enter into a purchase agreement until September 3, 1991. After taking possession, Gibson moved large amounts of compost onto the land to recondition the soil and also stored other items on the property.

Gibson informed his friend Orson Merrill he intended to purchase the Twenty Acres and, according to Gibson, Orson offered to loan Gibson $19,000 to finance the purchase. Further, Gibson asserts Orson agreed the interest on the loan would be the same rate received on funds he had in certificates of deposit.

Appendix A

Gibson claims he took a $5,000 check issued from his family trust to the November 7, 1991, closing and instructed the closing agent to issue the warranty deed to Orson and Lydia Merrill (the Merrills) so they could hold the deed as security for the $19,000 loan. Gibson asserts that in addition to providing the Merrills security for the loan, he wanted to protect the property as Gibson was involved in a dispute with the IRS.

October 29, 1991, Ada County sought a permanent injunction against Gibson, alleging his activities on the Twenty Acres violated a county zoning ordinance prohibiting junkyards. *Ada County v. Gibson,* 126 Idaho 854, 893 P.2d 801 (1995). After the November 7th closing, the Merrills and Gibson met with Ada County officials to find a way to exclude the Merrills from the injunction action. To resolve the issue, the Merrills executed an option contract giving Gibson a lease and the option to purchase the Twenty Acres on or before January 1, 1997. Gibson asserts the option contract only served to exclude the Merrills from the lawsuit and allowed the warranty deed to remain as security for the $19,000 loan. Gibson also points out he gave no consideration and never exercised the option.

According to Gibson, between 1991 and 2000, he improved the Twenty Acres by adding a fence, building a road, and contracting for a well and a pump. In addition, Gibson claims he advanced or reimbursed the Merrills in cash the equivalent of any tax assessment the Merrills paid. It is undisputed Gibson remained in possession of the Twenty Acres during this period and that he paid property taxes on the Twenty Acres on August 25, 2000, and made a

pre-payment of property taxes on September 13, 2000. Also, Gibson filed a notice of ownership with Ada County, September 28, 2000.

In 1999, the Merrills discovered the property taxes on the Twenty Acres would increase. Lydia Merrill and her son realized they needed to generate income from the property and approached Gibson with a written offer to either purchase the property or continue to lease it at a monthly rate. According to the written offer, Lydia asked for $79,500, less than the appraised value. Gibson refused, but offered to repay the $19,000. Lydia refused.

February 20, 2001, the Merrills filed a quiet title action in conjunction with a motion for a declaratory judgment in the trial court which was heard initially by Judge Williamson. The Merrills argued they owned the Twenty Acres and Gibson's interest was that of a tenant. The Merrills offered title insurance records, the warranty deed, closing instructions, and a cashier's check as evidence of ownership. The Merrills also asserted Gibson had not paid rent after December 1994, but conceded they did not request any because the land increased in value due to Gibson's improvements.

Gibson answered the complaint May 10, 2001, arguing he purchased the property September 3, 1991, and gave the Merrills the deed as security for the $19,000 loan which Orson Merrill intended to transfer back to Gibson. Gibson also claimed the Merrills could not enforce their security interest due to the running of adverse possession statutes. While this action was pending, the trial court recognized

Orson Merrill as incompetent and appointed Lydia guardian ad litum.[1] The Merrills then filed a motion for summary judgment and Gibson filed an answer, counterclaim, and claim for damages September 14, 2001.

Judge Williamson denied the Merrills' summary judgment motion, except as to the issues of the validity and enforceability of the option contract and issues of adverse possession. Judge Williamson ruled the option contract void because it had expired and ruled that Gibson's adverse possession claim had no merit because Gibson did not file the notice of ownership until September 2000, and it is not until this date that the five year statutory period for adverse possession began to run. Judge Williamson scheduled trial to commence on the remaining issues March 25, 2002.

On March 21, 2002, Gibson was informed orally that retired Senior Judge D. Duff McKee would hear the case. Gibson claims he immediately inquired as to whether an official assignment of record existed and discovered there was no certified order of assignment. Gibson filed a motion to disqualify Judge McKee March 22, 2002, pursuant to I.R.C.P. 40(d)(1), claiming the Idaho Supreme Court did not appoint Judge McKee, Judge Williamson had not been disqualified, and Gibson had not received any written notice of the appointment. Several days after the trial had concluded, Vice Chief Justice Gerald Schroeder entered an order *nunc pro tunc* assigning Judge McKee to this case.

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1. Orson Merrill became disabled and unable to speak in 1997-1998 due to health problems. He did not testify.

Appendix A

Trial commenced March 25, 2002, and Judge McKee denied Gibson's disqualification motion, ruling that I.R.C.P. 40(d)(1) was inapplicable to senior judges. After the trial, Judge McKee issued his judgment quieting title in the Merrills and ordering Gibson to pay costs. The Merrills then filed a motion for attorney fees under I.C. §§ 12-120(3) and 12-121, which Judge McKee denied. Gibson filed a timely notice of appeal from the judgment quieting title and the Merrills then cross-appealed the denial of attorney fees.

II. STANDARD OF REVIEW

This Court reviews the denial of an I.R.C.P. 40(d)(1) motion to disqualify and the award of attorney fees for an abuse of discretion, and the burden is on the person asserting error to show an abuse of discretion. *Anderson v. Ethington,* 103 Idaho 658, 651 P.2d 923 (1982). To determine whether the trial court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

This Court will only set aside a trial court's findings of fact if they are clearly erroneous. I.R.C.P. 52(a); *McCray v. Rosenkrance,* 135 Idaho 509, 513, 20 P.3d 693, 697 (2001). Evidence is substantial and competent if a reasonable trier of fact would accept it and rely on it. *Id.* Findings based on

substantial, competent evidence, although conflicting, will not be disturbed on appeal. *Bolger v. Lance,* 137 Idaho 792, 53 P.3d 1211 (2002). This Court exercises free review over the trial court's conclusions of law. *Conley v. Whittlesey,* 133 Idaho 265, 269, 985 P.2d 1127, 1131 (1999).

III. DISCUSSION

A. The trial court did not err in denying Gibson's I.R.C.P. 40(d)(1) motion to disqualify.

Before the trial commenced, Judge McKee denied Gibson's I.R.C.P. 40(d)(1) disqualification motion because it was untimely and the rule did not apply to senior judges.

According to the version of I.R.C.P. 40(d)(1) in effect at the time of this case, "the right to disqualification without cause shall not apply to . . . (iv) Senior judges assigned pursuant to I.C. § 1-2005." A senior judge is a judge "who leaves office or retires from . . . a trial court" and "may be designated a senior judge . . . by the supreme court." I.C. § 1-2005(1). A senior judge "is eligible for temporary assignment by the supreme court to a state court . . . whenever the supreme court determines that the assignment is reasonably necessary." I.C. § 1-2005(2). The assignment "shall be made by an order which shall designate the court . . . to which the judge is assigned and the duration of the assignment. Promptly after assignment . . . the supreme court shall cause a certified copy of the order to be sent to the senior judge and another certified copy to the court. . . ." I.C. § 1-2005(3).

Gibson argues the assignment is inconsistent with Article V, § 12, of the Idaho Constitution, which provides "any retired district judge, may hold a district court in any county at the request of the judge of the district court thereof, and upon the request of . . . the chief justice. . . ." Gibson argues that because the Chief Justice of the Idaho Supreme Court did not appoint Judge McKee, then the assignment is unconstitutional. Gibson misreads this provision of the constitution because it clearly states that a district judge may ask a retired district judge to sit, which is the case here. Moreover, an assignment order was signed by the Vice Chief Justice of the Court.

There is no dispute Judge McKee is a senior judge appointed pursuant to I.C. § 1-2005(3), but Gibson argues that the statute is unconstitutionally broad and requires a written assignment to be filed and a copy sent to the parties before the judge hears the case. However, I.C. § 1- 2005 clearly indicates that the order of assignment need only be promptly filed with the court and the judge. In this case, an order *nunc pro tunc* was entered within three weeks of the trial, was made effective back to before Judge McKee heard the case, and the judge and the trial court received copies. There is no showing that Judge McKee did not have the authority to hear the case.

Finally, the version of I.R.C.P. 40(d)(1) in effect at the time of trial specifically excluded senior judges and allowed disqualification only for cause under I.R.C.P. 40(d)(2). Gibson never moved to disqualify Judge McKee for cause and, therefore, the trial court was correct in denying Gibson's motion to disqualify.

B. The trial court correctly ruled on the Merrills' quiet title claim.

Gibson argues the Merrills' did not file the quiet title action within the time limits allowed by I.C. §§ 5-203 and 5-211. Section 5-203 provides that "no action for the recovery of real property . . . can be maintained, unless it appears that the plaintiff . . . was seized or possessed of the property in question within five (5) years before the commencement of the action." In addition, I.C. § 5-211 provides that when a landlord-tenant relationship exists, "the possession of the tenant is deemed the possession of the landlord, . . . where there has been no written lease, until the expiration of five (5) years from the time of the last payment of rent." Neither of these statutes has any bearing on Gibson's claims here.

I.C. § 5-203 does not apply because the Merrills had legal title to the property and thereby established seisin and possession. This Court stated in *Dickerson v. Brewster,* 88 Idaho 330, 337 (1930), "the requirement of seisin under [I.C. § 5-203] is satisfied in any case where the party opposing an adverse claimant is the holder of the legal title." *See also, Smith v. Long,* 76 Idaho 265, 281 P.2d 483 (1955). It appears the Merrills possessed record title and satisfied any seisin requirement under I.C. § 5-203 because their names were listed on the warranty deed. As a result, I.C. § 5-203 does not bar their quiet title action.

I.C. § 5-211 does not apply because Gibson did not bring a claim of adverse possession. As a result, I.C. § 5-211 would not bar any quiet title action by the Merrills.

While Gibson did not properly raise the issue of whether the trial court's decision was supported by substantial and competent evidence, he made some arguments to that effect in his briefing to this Court. After reviewing the record and decision, it is apparent the trial court properly weighed the evidence and determined the credibility of the parties, and there is substantial and competent evidence to support the trial court's decision.

C. Gibson is not entitled to attorney fees at the trial court level or on appeal.

Gibson asserts he should have been the prevailing party below and on appeal and is entitled to attorney fees under I.C. § 12-121. However, as discussed above, Gibson is not the prevailing party in this action and has no right to fees.

D. The trial court did not abuse its discretion when it denied the Merrills' request for attorney fees under I.C. §§ 12-121 and 12-120(3).

An award of attorney fees under I.C. § 12-121 is within the broad and sound discretion of the trial court. *Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 19, 740 P.2d 57, 61 (1987); *O'Boskey v. First Fed. Sav. & Loan Ass'n*, 112 Idaho 1002, 1008, 739 P.2d 301, 307 (1987). Idaho Code Section 12-121 provides: "In any civil action, the judge *may* award reasonable attorney fees to the prevailing party or parties . . ." (emphasis added). In addition, I.R.C.P. 54(e)(1) further limits a trial court's discretion by allowing a prevailing party attorney fees only if the trial court "finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation."

Appendix A

The trial court denied the Merrills' request, finding Gibson's defense presented "legitimate questions regarding the alleged oral agreement" between Orson Merrill and Gibson. Given the broad discretion afforded the trial court under I.C. § 12-121, this Court finds the trial court did not abuse its discretion by denying the Merrills' request for attorney fees.

Idaho Code Section 12-120(3) provides in part: "In any civil action to recover . . . in a commercial transaction unless otherwise provided by law, the prevailing party shall be allowed reasonable attorney fees to be set by the court." The language of I.C. § 12-120(3) is mandatory and requires a trial court to award attorney fees to the prevailing party. *Inland Title Co. v. Comstock,* 116 Idaho 701, 779 P.2d 15 (1989); *Torix v. Allred,* 100 Idaho 905, 911, 606 P.2d 1334, 1340 (1980). A commercial transaction is defined "to mean all transactions except transactions for personal or household purposes." I.C. § 12-120(3). Attorney fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Brower v. E.I. DuPont De Nemours & Co.,* 117 Idaho 780, 784, 792 P.2d 345, 349 (1990); *See Sun Valley Hot Springs Ranch v. Kelsey,* 131 Idaho 657, 962 P.2d 1041 (1998).

The trial court found the Merrills' action involved a determination of property rights and I.C. § 12-120(3) does not support an award of attorney fees in such an action. We agree. The alleged commercial transaction in this case (leasing the Twenty Acres for operation of a nursery) is not integral to the quiet title claim. The Merrills quiet title action

involves the determination of rights to the Twenty Acres; it does not involve the validity or breach of a commercial lease.

E. The Merrills are entitled to attorney fees under I.C. § 12-121.

When faced with an appeal and cross-appeal, an appellate court may independently consider the appropriateness of an award for attorney fees in each appeal. *Fairfax v. Ramirez,* 133 Idaho 72, 982 P.2d 375 (Ct.App.1999). This Court may award attorney fees on appeal "when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). This Court will not award attorney fees "where the losing party brought the appeal in good faith and where a genuine issue of law was presented." *Id.*

Gibson's claim that the Idaho Supreme Court's *nunc pro tunc* order is invalid, is frivolous and without foundation. In addition, Gibson admitted publicly he was a tenant when it suited his case and cited to irrelevant adverse possession statutes in support of his claim. As a result, the Merrills are entitled to attorney fees for defending Gibson's frivolous appeal under I.C. § 12-121.

IV. CONCLUSION

The trial court properly denied Gibson's I.R.C.P. 40(d)(1) disqualification motion because senior judges appointed under I.C. § 1-2005 are excepted from I.R.C.P. 40(d)(1) motions to disqualify without cause and the *nunc pro tunc* order retroactively and properly assigned Judge McKee to this case in accordance with I.C. § 1-2005. I.C. §§ 5-203 and 5-211 are inapplicable and do not bar the Merrills' quiet title claims. The trial court properly denied the Merrills' request for attorney fees below. The decision of the trial court is affirmed. The Merrills' request for attorney fees on appeal is granted, together with their costs on appeal.

Justices KIDWELL, EISMANN and BURDICK **CONCUR**.

Justice SCHROEDER sat but did not participate in the decision.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF IDAHO DATED APRIL 16, 2002

IN THE SUPREME COURT OF THE STATE OF IDAHO

ASSIGNMENT OF SENIOR JUDGE
D. DUFF McKEE

ORDER

A request has been received for judicial assistance in the Fourth Judicial District and the Court having determined that the assignment is reasonably necessary and will promote the efficient administration of justice; thereon,

IT IS HEREBY ORDERED that Senior Judge D. Duff McKee be, and he hereby is, ASSIGNED to the Fourth Judicial District to preside in any cases as may be assigned to him by the Administrative District Judge of the respective judicial district with the approval of the Administrative Director of the Courts for purposes of any pending matters and all proceedings necessary for their final disposition during the period indicated below:

January 1, 2002 through June 30, 2003

IT IS FURTHER ORDERED that a copy of this Order shall be placed in a senior judge assignments file to be maintained by the District Court Clerk as a central register of all assignment orders.

DATED this 16 day of April 2002, nunc pro tunc January 1, 2002.

Appendix B

By order of the Supreme Court

s/ Gerald F. Schroeder
Gerald F. Schroeder, Vice Chief Justice

ATTEST:

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF IDAHO DENYING PETITION FOR REHEARING DATED APRIL 12, 2004

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 28542

Ref. No. 04RH-9

ORSON MERRILL and LYDIA MERRILL,
husband and wife,

Plaintiffs-Counterdefendants-
Respondents-Cross Appellants,

v.

DAVID GIBSON, an individual, and ALL UNKNOWN INDIVIDUALS who may claim any interest in the real property which is the subject of these proceedings, individually, jointly and severally,

Defendants-Counterclaimants-Appellants-
Cross Respondents.

The Appellant having filed a PETITION FOR REHEARING on March 19, 2004 and supporting MEMORANDUM on April 5, 2004 of the Court's Opinion released February 27, 2004. Therefore, after due consideration,

Appendix C

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 12th day of April, 2004.

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk